CITATION: R. v. M.F. & P.F, 2010 ONSC 1925
COURT FILE NO.: 117/09
DATE: 2010-03-31

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HER MAJESTY THE QUEEN	)	Mary Ward, for the Crown
– and –	)	
M.F. and P.F.	)	
Defendants	)	Donald Fraser, for the Accused M.F.
	)	Victoria Loh, for the Accused P.F.
	)	**HEARD:** March 30, 2010

REASONS FOR JUDGMENT

GRAY J.

[1] This is an application by both accused for the severance of a 15-count indictment, and requiring separate trials on three groups of counts, namely, on counts 1 – 6; counts 7 – 12; and counts 13 – 15. To be clear, the two accused are content that the three separate trials proceed as joint trials involving both accused. It is contended that each separate trial should proceed with respect to only one of the three complainants.

[2] The 15 counts in the indictment allege a number of sexual offences against three different complainants. Counts 1 – 6 relate to complainant "A."; counts 7 – 12 relate to complainant "B"; and counts 13 – 15 relate to complainant "C".

[3] The joinder and severance of counts in an indictment are dealt with in s. 591 of the *Criminal Code*, which provides as follows:

> 591.(1) Subject to section 589, any number of counts for any number of offences may be joined in the same indictment, but the counts shall be distinguished in the manner shown in Form 4.
>
> (2) Where there is more than once count in an indictment, each count may be treated as a separate indictment.
>
> (3) The court may, where it Is satisfied that the interests of justice so require, order
>
> (a) that the accused or defendant be tried separately on one or more of the counts;
>
> and
>
> (b) where there is more than one accused or defendant, that one or more of them be tried separately on one or more counts.
>
> (4) An order under subsection (3) may be made before or during the trial but, if the order is made during the trial, the jury shall be discharged from giving a verdict on the counts
>
> (a) on which the trial does not proceed; or
>
> (b) in respect of the accused or defendant who has been granted a separate trial.
>
> (5) The counts in respect of which a jury is discharged pursuant to paragraph (4)(a) may subsequently be proceeded on in all respects as if they were contained in a separate indictment.
>
> (6) Where an order is made in respect of an accused or defendant under paragraph (3)(b), the accused or defendant may be tried separately on the counts in relation to which the order was made as if they were contained in a separate indictment.

[4] The relevant subsection for the purposes of this application is section 591(3), which provides that the accused may be tried separately on one or more counts where the Court "is satisfied that the interests of justice so require".

[5] These words obviously confer a broad discretion on the Court. While the Crown, pursuant to s. 591(1), is itself given a broad discretion in joining any number of counts in a single indictment, the Court has the power to order separate trials where the interests of justice requires it.

[6] An analysis of the factors to be considered in exercising the Court's discretion has been recently undertaken by the Supreme Court of Canada in *R. v. Last*, [2009] 3 S.C.R. 146. In that case, the trial judge had declined to order separate trials where an indictment alleged two separate sexual offences against an accused, that were unrelated in terms of time and location, as well as involving different complainants. The trial judge found that there was a nexus in time and place because the incidents occurred roughly one month apart in the same city. He was not persuaded that the question of prejudice would be significant, since a modern jury should be able

to handle appropriate instructions given by the trial judge. He did not place much weight on a statement by defence counsel that the accused might wish to testify on counts related to one incident but not the other. The accused was convicted on all counts, and he appealed.

[7] The Court of Appeal, in reasons reported at (2008), 91 O.R. (3d) 561 (C.A.), dismissed the appeal. The majority held that the trial judge had not acted unjudicially in refusing to sever the counts in the indictment. Juriansz J.A. dissented. In his opinion, the trial judge erred in assessing the weight of the relevant factors and their cumulative effect on the interests of justice.

[8] On further appeal to the Supreme Court of Canada, the appeal was allowed and a new trial was ordered. Deschamps J., for a unanimous Court, at para. 16, states the following:

> The ultimate question faced by a trial judge in deciding whether to grant a severance application is whether severance is required in the interests of justice, as per s. 591(3) of the *Code*. The interests of justice encompass the accused's right to be tried on the evidence admissible against him, as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner. The obvious risk when counts are tried together is that the evidence admissible on one count will influence the verdict on an unrelated count.

[9] At para. 18 of her judgment, Deschamps J. listed the following factors to be considered by the Court in exercising its discretion under s. 591(3) of the *Code*:

(a) the general prejudice to the accused;

(b) the legal and factual nexus between the counts;

(c) the complexity of the evidence;

(d) whether the accused intends to testify on one count but not another;

(e) the possibility of inconsistent verdicts;

(f) the desire to avoid a multiplicity of proceedings;

(g) the use of similar fact evidence at trial;

(h) the length of the trial having regard to the evidence to be called;

(i) the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and

(j) the existence of antagonistic defences as between co-accused persons.

[10] Of course, some of these factors will have greater or less weight, or even no weight, depending on the circumstances. Some of the factors overlap. For example, the legal and factual nexus between the counts will be relevant to the potential admission and use of similar fact evidence at the trial.

[11] In the *Last* case itself, Deschamps J. focused on the accused's intention to testify; the nexus between the incidents; the potential use of similar fact evidence; and the prejudice to the accused. In the final analysis, she concluded that there was little nexus between the incidents; there was little overall benefit to the administration of justice in having a single trial; and there was a significant possibility of prejudice to the accused.

[12] Before turning to the application of the appropriate factors to this case, I will briefly canvass the facts of this case that are relevant to the exercise of my discretion.

[13] It is alleged that between June 29, 2002 and August 10, 2003, when complainant "A" was 10 or 11 years old, she was sexually assaulted twice by both accused. The accused are married to each other, and the female accused is the biological mother of complainant "A".

[14] It is alleged that while complainant "A" was bathing, both accused entered the bathroom and the male accused pulled her from the bathtub and while she was standing, attempted sexual intercourse with her while the female accused held her hands behind her back. It is alleged that they pushed the complainant to her back on the floor and while the female accused held the complainant's hands above her head and told her not to be scared and to not tell anyone, the male accused had vaginal intercourse with her. After the complainant bit the male accused on the arm, he struck her with his hand, and threatened to kill her if she told anyone.

[15] A second allegation is that during the same period, the male accused entered the complainant's bedroom while she was sleeping, removed his clothes, and attempted vaginal intercourse. The complainant alleges that she kicked and screamed until the male accused gave up. He called her a "bitch", picked up his clothes and left.

[16] With respect to complainant “B”, she was 15 years old when she dated the nephew of the male accused and resided with both accused between December 4, 2004, and March 31, 2005.

[17] It is alleged that on December 4, 2004, the complainant took the dog for a walk with the male accused and when they returned to the house, they smoked marijuana and went to the bedroom of the accused. The female accused was asleep on the bed and the complainant sat at the foot of the bed while the male accused lay on it. She alleges that the male accused touched her buttocks with his foot, moved up behind her and digitally penetrated her vagina with his finger. She left the bedroom and went to her own bedroom, on which the male accused attended, pulled off her pants and panties, and attempted intercourse. Despite her protestations, he continued his efforts, unsuccessfully, and left the room.

[18] She further alleges that a month after that incident, she was in her bedroom and heard knocking from the accuseds’ bedroom, upon which she entered and smoked marijuana with them. She alleges that her clothes were removed and that while the female accused covered her mouth with one hand and inserted a dildo into her anus with the other, the male accused was on top of her and had intercourse.

[19] The complainant further alleges that shortly thereafter, while she was sleeping in the accuseds’ bedroom, she awoke to find the male accused on top of her having intercourse. She alleges that the female accused was laying beside her, holding her hand with one hand and masturbating her with another.

[20] She further alleges that on another occasion, she had consumed Gravol and sleeping pills provided by the female accused, and that while she lay asleep the male accused put his hands down her pants and fondled her buttocks.

[21] With respect to complainant “C”, between October 3, 2002 and October 3, 2004, while the complainant was approximately 14 or 15 years old, it is alleged that the complainant was sitting on the accuseds’ bed. At this time, the brother of complainant “A” was approximately three years old. It is alleged that while the complainant was on the accuseds’ bed, the female complainant was behind her, pulled her back down on the bed, held her head, and told complaint

"A's" brother to put his penis into the complainant's mouth. The complainant alleges that she did not wish to participate, but the young boy removed his diaper, got on top of her and placed his penis in front of her mouth.

[22] On another occasion, the complainant alleges that she was sleeping in the accuseds' bedroom, when she awoke to find the male accused grabbing her buttocks while he was having sexual intercourse with the female accused.

[23] Before leaving the factual matrix, it should be noted that the Crown asserts that there is a considerable nexus between the alleged events, and that this nexus will have relevance to the Crown's application to have all of the evidence considered to be similar fact evidence, admissible on all of the counts. The Crown points out that each offence involved young girls; the young boy involved in the offence involving complainant "C" is the brother of complainant "A"; third parties were close by while the offences were committed, and fear of detection did not appear to be important; the disclosure of the offences occurred at approximately the same time several years later, and in similar circumstances; and the offences all occurred in the accuseds' residence and often in the presence of each other.

[24] It should also be noted that, while the accused originally elected trial by judge and jury, they have subsequently re-elected trial by judge alone.

[25] I propose to consider certain of the factors delineated by Deschamps J. in para. 18 of *Last, supra,* and then determine whether the interests of justice require separate trials.

[26] As did Deschamps J., I will start with the intention of the accused to testify on one count, but not another. Ms. Loh, for the male accused, advised me that it is her client's current intention to testify with respect to the counts relating to complainant "B", but not with respect to complainants "A" and "C". Without going into detail, in her view there are weaknesses in the Crown's case regarding complainants "A" and "C" that will make it unnecessary, or at least less likely, that the accused will testify with respect to the allegations of those complainants. It is more likely, in her view, that the male accused will find it necessary to testify regarding the allegations of complainant "B".

[27] Mr. Fraser, on behalf of the female accused, was less definitive as to which counts would or would not be the subject of testimony by his client, but advised me that it was likely that his client would testify on some counts but not others.

[28] At para. 26 of her judgment in *Last*, Deschamps J. observed that, for this factor to have any weight, it would be necessary for an accused to provide sufficient information to convey that, objectively, there is substance to his or her testimonial intention.

[29] While I am prepared to assume that both accused have shown, objectively, that there is substance to their testimonial intentions, like Deschamps J. I am not prepared to give this factor very much weight. In the final analysis, the resolution of the case is likely to involve, to a large extent, issues of credibility. While both accused may succeed in raising doubts as to the credibility of one complainant or another, the decision of whether to testify or not is likely to be based on strategic considerations, and may involve factors as to whether the accused, themselves, will likely be credible witnesses. It is probable, in my view, that the strategic decision of whether to testify or not will involve the same considerations with respect to each of the complainants.

[30] In terms of the nexus among the incidents, in my view there is a much stronger nexus than was the case in *Last*. The complainants knew each other. There is a direct nexus between complainant “A” and her brother, who had some involvement in one of the incidents involving complainant “C”. The complainants were all young girls at the time the incidents occurred, and the incidents all occurred in the accuseds’ residence. The disclosure of the incidents occurred at approximately the same time, under similar circumstances. Indeed, there may be some concern as to possible collusion among the complainants.

[31] Some of these elements, of course, will have relevance to the Crown’s similar fact evidence application, which the Crown indicates will likely be brought after the Crown’s evidence has been heard. As noted by Deschamps J., at para. 34 of *Last*, there is no procedural rule requiring the Crown to bring the similar fact evidence application at the time of the severance application, and in many cases, the assessment of the evidence may be best done once all of the Crown’s evidence has been tendered.

[32] It is not necessary for me to decide, at this stage, whether the Crown's similar fact evidence application will succeed. In *Last*, at para. 34, Deschamps J. held that it was clear at the severance motion in that case that a similar fact application was not likely to succeed. In contrast, in *R. v. J.N.W.*, [2010] O.J. No. 730 (S.C.J.), Fragomeni J., at paras. 56 and 57, held that the Crown had "a viable similar fact application".

[33] Similarly, I am persuaded that the Crown in this case has a viable similar fact application. Thus, at the least, such an application has a reasonable prospect of success, and is not doomed to failure as was the case in *Last*.

[34] That being the case, I must consider the effect of an order severing the counts and ordering separate trials, on the assumption that the Crown will maintain its position that a similar fact ruling should be made. If separate trials are ordered, three separate similar fact applications must be made, and much of the same evidence must be called, at least on a *voir dire*, on each of them. This would mean that each complainant may have to testify about the events in question a number of different times. While prejudice to the accused is an important, and perhaps overriding, consideration, nevertheless unfairness, or potential unfairness, to the complainants is also a consideration.

[35] In my view, this factor favours the holding of a single trial rather than multiple trials.

[36] In terms of the benefits to the administration of justice, the Crown submits that if separate trials were held, it would be necessary for the Crown to call all of the complainants at each trial in any event. Quite apart from the issue of similar fact evidence, the Crown submits that, to some extent, the evidence of each complainant would be necessary for the purpose of completing the narrative. This is particularly so, the Crown submits, as it relates to the disclosure of the allegations by the complainants. The disclosures occurred at approximately the same time under similar circumstances. It would be necessary for the trier of fact to have a full picture of the narrative in order to place the events in context.

[37] As is the case with respect to the similar fact evidence issue, it is not necessary for me to decide, in any definitive way, whether this approach by the Crown would succeed. However, I

think there is at least some basis for the Crown to take this position. In the final analysis, however, I do not think this factor has a great deal of weight.

[38] As far as prejudice to the accused is concerned, at paras. 26 – 42 of *Last*, Deschamps J. identified two significant issues. First, joinder creates the potential for cross-pollination on credibility assessments. Second, joinder creates a risk of prohibited propensity reasoning. Indeed, as stated by Deschamps J. at para. 40, "the significant risk of propensity reasoning to the accused cannot be understated".

[39] The discussion in *Last* was in reference to a jury trial. In this case, there will be no jury. The Crown argues that this means the issue of prejudice to the accused is eliminated, or at least minimized.

[40] Ms. Loh, counsel for the male accused, rightly points out that the risks of cross-pollination on credibility assessments and the risk of propensity reasoning can be minimized if there is no jury, but they cannot be eliminated. Judges are human beings. They hear and assess evidence in the same way that juries do, and while they are trained to compartmentalize evidence, they cannot, nor can they be expected to, completely put aside the sorts of improper influences that can be brought to bear on decision makers.

[41] I agree with Ms. Loh that while prejudice to the accused can be minimized if there is no jury, it cannot be eliminated. Prejudice will be less of a concern, however, if there is no jury. As stated by Finlayson J.A., for the Court of Appeal in *R. v. E.(L.)* (1994), 94 C.C.C. (3d) 228, at p. 238:

> The existence of a jury is not a specific factor, but the fact that there is not going to be a jury means that the consideration of complexity, and to a lesser extent prejudice, will not have the same weight.

[42] When all is said and done, it is necessary to return to the words of s. 591(3) of the *Code*, and decide whether the interests of justice require that there be separate trials rather than one trial.

[43] I will address briefly those factors listed by Deschamps J. in para. 18 of *Last* that are particularly germane to this case. The legal and factual nexus between or among the various counts, while perhaps being either neutral or slightly favouring a single trial standing alone, assume somewhat greater importance in terms of the Crown's similar fact evidence application. The Crown has at least a viable application, and this favours a single trial. The intention of the accused to testify on one count but not another is not a strong factor one way or the other. Potential prejudice to the accused is usually a factor favouring separate trials, but in this case the importance of that factor is reduced because there will be no jury. Of some significance here is the avoidance of multiple proceedings, and the concomitant minimization of potential unfairness to the complainants.

[44] On balance, I am not satisfied that the interests of justice require separate trials.

[45] For the foregoing reasons, the application is dismissed.

GRAY J.

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